

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 March 2004

BALCA Case No: 2002-INA-305
ETA Case No.: P2000-CA-09487030/ML

In the Matter of:

CYTEK MFG. INC.,
Employer,

on behalf of

MOISES TREJO,
Alien.

Appearance: Gloria Lara, Representative
Santa Ana, California
For Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arose from an application for labor certification on behalf of Moises Trejo ("the Alien") filed by Cytek Mfg. Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained

in the Appeal File (“AF”) and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On June 19, 1998, Employer filed an application for labor certification on behalf of the Alien for the position of Machine Setter. (AF 34-35).

On October 11, 2001, a Notice of Findings (“NOF”) was issued, indicating intent to deny the application on the ground that Employer failed to advertise the position reflecting the amended hourly wage of \$15.31 per hour. (AF 30-32). To correct the deficiency, Employer was required to agree to retest the labor market using the amended hourly wage.

On October 23, 2001, Employer agreed to retest the labor market and submitted a proposed advertisement reflecting the amended wage of \$15.31 per hour. (AF 28-29).

On June 4, 2002, a Second Notice of Findings (“SNOF”) was issued, indicating intent to deny the application on the ground that Employer failed to provide sufficient evidence demonstrating its recruitment efforts. The CO noted that the evidence provided by Employer was insufficient to show that Employer conducted a good faith recruitment effort or that Employer contacted Applicant #1. To remedy the deficiency, Employer was advised to submit a Rebuttal demonstrating its good faith recruitment efforts. (AF 8-10).

On June 12, 2002 Employer submitted its Rebuttal. (AF 6-7). Employer asserted that it had timely contacted Applicant #1 by telephone and U.S. regular mail on March 25, 2002. Employer was unable to provide proof of the contacts, as the telephone contact was through a local call and local calls are not reflected in the telephone bill. Additionally, because it did not use certified mail, Employer had no record that the letter was mailed.

On July 9, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 4-5). The CO found that Employer did not provide any evidence supporting its good faith recruitment as required by the SNOF. The CO noted Employer’s failure to include a copy of the letter written to Applicant #1 with either the Recruitment Report or the Rebuttal.

On August 6, 2002, Employer filed its Request for Review on the ground that it made good faith recruitment efforts. Employer noted that Applicant #1 was the only applicant that applied both times the job was advertised and on both occasions, he failed to demonstrate interest in the position because he failed to arrive for the interviews. Employer asserted that its good faith efforts in recruitment were reflected in its willingness to interview an individual who failed to show up for a previous interview. (AF 1-3). The matter was docketed in this Office on September 17, 2002; the AF does not reflect that a brief was filed.

DISCUSSION

A recruitment report must describe the details of the employer's recruitment efforts to be sufficient. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*). A general recruitment report provides an insufficient basis upon which to conclude the employer engaged in good faith recruitment and had job-related reasons for rejecting U.S. applicants. *Nitto Denko Am., Inc.*, 1991-INA-93 (Apr. 1, 1992); *TPK Constr. Corp.*, 1991-INA-223 (June 30, 1992).

Employer’s Recruitment Report dated March 29, 2002 consisted of one page and was devoid of evidence supporting the assertions in the report. (AF 16). Additionally, Employer’s use of a single sentence to detail its recruitment effort does not support a finding that Employer recruited in good faith.¹ The employer bears the burden in labor

¹ The Recruitment Report’s only reference to its effort to contact Applicant #1 states: “The applicant was called by phone and by mail on March 25, 2001 but no contact was able to be made.” (AF 16).

certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997).

Employer failed in its obligation to properly document the Recruitment Report by providing a minimalist version of the report. Consequently, we agree with the CO's finding that there is insufficient evidence about Employer's recruitment effort to support a finding that Employer recruited in good faith. The CO in the NOF advised Employer that it could cure the deficiency by documenting the recruitment efforts; however, Employer failed to do so.

Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993). Under the regulatory scheme of 20 C.F.R. § 656.24, the Rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

In lieu of documents, Employer, in its Rebuttal, submitted a self-serving unsupported statement affirming its good faith efforts in recruiting. Bare assertions by an employer are not sufficient to carry its burden of demonstrating good faith recruitment. *Brilliant Ideas, Inc.*, 2000-INA-46 (May 22, 2000) *Inter-World Immigration Service*, 1988-INA-490 (Sept. 1, 1989).

Employer's rejection of Applicant #1 based on Employer's inadequate recruiting effort did not support the finding that its reasons for rejecting him were lawful and job-related within the meaning of these regulations. *Peter Hsieh*, 1988-INA-540 (Nov. 30, 1989); *John & Winnie Ng*, 1990-INA-134 (Apr. 30, 1991). As the record is sufficient to

support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue.²

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the
Board of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400

² In addition, Employer has an obligation to try alternative means of contact should the initial attempt fail. *Jacob Breakstone*, 1994-INA-534 (Aug. 1, 1996). Follow-up attempts to contact applicants is an essential element of the “good faith” recruitment process, and labor certification is properly denied where alternative methods of contact are not utilized and documented. *Divinia M. Encina*, 1993-INA-220 (June 15, 1994); *Damas Atlantic, Ltd.*, 1993-INA-158 (May 4, 1994). Employer’s failure to establish that it made a diligent effort to contact applicants is a material defect in the recruitment effort. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*).

In the instant case, because there was a single applicant to contact, Employer’s claim that it recruited in good faith by mailing only one letter and by making a single telephone call to the sole applicant is disingenuous. This meager step shows a minimal effort, that by itself, does not equate to a good faith recruitment effort. An employer's effort must show that it seriously wanted to consider the U. S. applicant for the job, not merely go through the motions of a recruiting effort without serious intent. *Compare Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988) (*en banc*) and *Suniland Music Shoppes*, 1988-INA-93 (March 20, 1989) (*en banc*). Therefore, the above stated reasons are additional grounds for denying Employer’s labor certification application.

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.